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NO. 58200-3

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

ENVER MESTROVAC,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON, AND THE BOARD OF INDUSTRIAL INSURANCE
APPEALS,

Appellants/Cross-Respondents.

**BRIEF IN REPLY AND IN RESPONSE BY APPELLANT/CROSS-
RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES**

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Appendix A

Superior Court Order on Reconsideration

I. DEPARTMENT'S REPLY ON INTERPRETER ISSUES

Mestrovac's brief, for the most part, separately addresses the Superior Court rulings on what levels of interpreter services are required (1) at the Department of Labor and Industries (Department-level interpreter services) and (2) at the Board of Industrial Insurance Appeals (Board-level interpreter services). The Department Reply will primarily address *Department*-level interpreter services issues (and any *Department* responsibility for attorney fees and costs) and generally leave it to the Board to address *Board*-level interpreter services issues (and any *Board* responsibility for attorney fees and costs).

A. Neither the Board nor the Superior Court had jurisdiction to order expanded Department-level interpreter services

As demonstrated in the Department's opening brief, the Superior Court erred in concluding that the Court had subject matter jurisdiction over Mestrovac's demand for expanded Department-level interpreter services. DLI Op. Br. at 16-23. The Department demonstrated, based on precedent going back over 80 years, that because Mestrovac's appeals were from time-loss compensation orders that did not address interpreter services, his appeals did not invoke the subject matter jurisdiction of the Board and Superior Court over the interpreter service issues.

Mestrovac argues that RCW 51.52.050 permits an appeal from *any* action or decision of the Department. He argues that where the Department receives from an English-speaking attorney a demand that it provide interpreter services to her Bosnian-speaking client, its later issuance of a time-loss compensation order sent to that attorney in English somehow constitutes an implicit Department action or decision denying expanded interpreter services to the client. Mest. Op. Br. at 10-13.

Mestrovac even argues that Department *inaction* after a request for any service can be appealed to the Board. Mest. Op. Br. at 10-13. His arguments are unsupported by any authority, ignore critical facts in this case, and, if accepted, would produce a strained result that matters not yet considered or actually decided by the Department would be routinely brought before the Board for decision, thus making the Board the first-line decider contrary to its narrow, statutory role as a quasi-judicial entity.

On October 10, 2003, attorney Ann Pearl Owen sent the Department a letter notifying the Department that she now represented Mestrovac, and that the Department was to communicate through her on the claim. BR 279-80.¹ In that letter she informed the Department that

¹ "BR" references the Certified Appeals Board Record of the Board of Industrial Insurance Appeals. Documents in that record will be cited as "BR" with the Board's stamped page number. Exhibits are separately collected in the Board record and will be cited simply as "BR Ex. # ____". Witness testimony will be cited as "BR Tr. ____" with the date of testimony, name of witness, and page number.

Mestrovac “does not speak English as his native language,” but she did not otherwise address the interpreter services question. BR 279-80.

On October 20, 2003, attorney Owen sent the Department a letter demanding that the Department enter an order authorizing interpreter services and the payment of bills for additional interpreter services “in connection with Mr. Mestrovac’s communications with his health care providers, DLI, the Board, voc rehab personnel, IME examiners, and his counsel through all phases of his claims and appeals thereon.” BR 284-85. Nowhere in that letter did she demand that the Department issue future orders in Bosnian or both in Bosnian and English.

The Department issued English-written *time loss compensation* payment orders on October 10, 2003 (mailed to Mestrovac), October 24, 2003 (mailed to attorney Owen), and November 7, 2003 (mailed to attorney Owen). BR 276, 296, 298. Through attorney Owen, Mestrovac appealed to the Board from each order. BR 7. He apparently argues (1) that he could appeal to the Board from the Department’s inaction on his interpreter-expansion request or (2) that the Department’s issuance of the October 24 and November 7 time-loss orders sent to attorney Owen in English was somehow an implicit denial of the interpreter services requested in the October 20, 2003 letter of Owen. Mest. Op. Br. at 16-23.

This Court should reject Mestrovac's jurisdictional arguments.²

As noted, Washington courts have consistently held that, because the Legislature has made the Department the first-line agency on workers' compensation matters, neither the Board nor a court has subject matter jurisdiction over matters not addressed in the Department decision on appeal. DLI Op. Br. at 16-23. No reported Washington court decision provides any support for Mestrovac's theory that, where a worker has requested several types of relief from the Department, a Department order that grants one type of relief but fails to address the others is either an appealable inaction or an implied denial of the not-granted relief.

Mestrovac's theories, if accepted, present the risk that numerous similar, tactically-preemptive appeals would be filed to the Board in circumstances that not only would increase the already-burgeoning Board caseload, but also would turn the Board and the courts (who review Board decisions de novo per RCW 51.52.115) into first-line operational agencies. Piecemeal litigation also would be fostered. And the Board and courts

² His theories are also factually defective. The critical factual defect in Mestrovac's theories is that attorney Owen's letter to the Department of October 20, 2003 addressed several matters relating to interpreter services but did not ask the Department to issue its orders (that would be coming to her) in a language other than English. Thus, Mestrovac perplexes when he suggests that the Department's issuance of English language orders on his claim after October 20, 2003 somehow can be interpreted as rejecting the interpreter services relief he had asked for in his October 20, 2003 letter.

would be required to develop a body of law on what constitutes an appealable inaction or an implicit Department "action."

Mestrovac's theories also pose the risk that conflicting Department "actions" on the same claim could be brought before the Board at the same time, thus creating a tangled mess for the Board and courts to sort out. Moreover, while Mestrovac invokes the liberal construction rule of RCW 51.12.010 (Mest. Op. Br. at 12-13), his theories allowing appeals of inactions and implicit actions would hurt many workers because employers would invoke the same expansive jurisdiction, thus delaying payment of benefits and dragging workers into protracted and expensive litigation at the Board prior to the point when the Department had the opportunity to fully adjudicate questions pending before it.

Mestrovac cites three Board decisions where the Board held or explained that parties may appeal informal Department letters that do not meet the formal order requirements of RCW 51.52.050. Mest. Op. Br. at 13 n.9. Those Board decisions do not support his theories. The Department does not argue that only a formal "order" is appealable. Instead, the Department argues that, in order for a party to bring an issue before the Board and the courts *in an appeal governed by Title 51 RCW*, there must first be a "memorialized decision" (whether by letter or formal order) of the Department manifesting a Department determination on that

issue. DLI Op. Br. at 22. Here, the three appealed Department time-loss orders do not manifest any determination by the Department on the Department-level interpreter services issue. Thus, that issue was not before the Board or the courts in the appeals from these orders.

Mestrovac relies on some loose language in this Court's decision in *Dils v. Department of Labor & Industries*, 51 Wn. App. 216, 752 P.2d 1357 (1988). Mest. Op. Br. at 10-11. His reliance on *Dils* is misplaced. In *Dils*, this Court addressed a lawsuit by some workers against the Department for alleged wrongful denial and delay of claims administration. In ruling that the workers had not exhausted their remedies and therefore could not pursue their lawsuit, the *Dils* Court said, inter alia, that the workers "*could have objected to the Department's claim processing procedures by requesting reconsideration by the Department or by appealing to the Board.*" *Dils*, 51 Wn. App. at 219 (emphasis added). The *Dils* Court went on to say, "Assuming for the moment that neither the Department nor the Board responded to [the workers'] objections, [the workers] could have petitioned the court for a writ of mandamus . . . to compel agency action." *Id.* at 220 (citations omitted). Mestrovac seized on the above-italicized language to argue that mere inaction by the Department can be appealed to the Board. Mest. Op. Br. at 10.

Mestrovac overlooks the more recent decision, *Cena v. Department of Labor & Industries*, 121 Wn. App. 352, 358, n.13, 88 P.3d 432 (2004), in which this Court interpreted the exclusive remedy provision of Title 51 RCW and rejected a worker's personal injury lawsuit for damages against the Department for negligent claims administration.

The *Cena* Court cited *Dils*, but provided a more careful explanation relating to the subject matter jurisdiction question involved here. The *Cena* Court explained that "an aggrieved worker may request reconsideration by L&I or may appeal *any decision* regarding the administration of the claim to the Board." *Id.* (emphasis added). The *Cena* Court said, "If *Cena* was as frustrated with the process as counsel claims, *and could not procure a decision from L&I*, *Cena* could have filed a writ of mandamus pursuant to RCW 7.16.160 in superior court to compel agency action." *Id.* (emphasis added). Thus, the more recent *Cena* decision recognizes that the law requires that there be a memorialized Department decision addressing the issue that the party seeks to bring before the Board.

Here, there is no memorialized Department decision on Department-level interpreter services. Therefore, the Department-level interpreter services issue was not before the Board and cannot be before the courts. The Superior Court decision on this issue must be reversed.

B. The Department has not exaggerated the ramifications of Mestrovac's constitutional theories and of the Superior Court's ruling fully adopting his interpreter services theories

In its opening brief, the Department asserted that the ramifications of Mestrovac's theories for a constitutional right to interpreter services were staggering. DLI Op. Br. at 23-24. Under his theories, all governmental agencies of all sizes and at all levels (state, local and federal) would be legally obligated to provide interpreter services for all government programs and services to all limited-English-proficiency persons, regardless of which of the over 6900 living languages of the world were the persons' primary language. DLI Op. Br. at 23-24.³

Mestrovac has tactically chosen (at least so far) not to assert his constitutionally based demand for interpreter services for all of his

³ Mestrovac asserts there is no evidence in the record that there are "9000 [sic] different languages in the world" but he does not attempt to challenge the accuracy of the scholarly work cited by the Department (Gordon, Raymond G., Jr. (ed.) 2005, *Ethnologue: Languages of the World*, 15th Ed.). Mest. Op. Br. at 14 n.11. This Court should take judicial notice of the legislative facts provided in the Department's brief. See *State ex. Rel. T.B. v. CPC Fairfax Hosp.*, 129 Wn.2d 439, 453-54, 918 P.2d 497 (1996); *Wyman v. Wallace*, 94 Wn.2d 99, 102-03, 615 P.2d 452 (1980); *State v. Balzer*, 91 Wn. App. 44, 58-59, 954 P.2d 931 (1998); *In re Marriage of Campbell*, 37 Wn. App. 840, 845, 683 P.2d 604 (1984). See generally 5 KARL B. TEGLAND, WASH. PRACTICE, Evidence § 49 (3rd ed. 1989) ("TEGLAND"); John W. Strong, et. al., MCCORMICK ON EVIDENCE § 331 (4th ed. 1989) ("MCCORMICK"). "Legislative facts" are social, economic, and scientific realities or facts that enable the court to interpret the law. *Wyman v. Wallace*, 94 Wn.2d at 102. While the state and federal rules of evidence are relatively strict in relation to judicial notice of *adjudicative* facts, the evidence rules carefully ensure that the courts are unrestricted in their ability to consider *legislative facts* that are useful in the interpretation of statutes or that are otherwise helpful in interpreting the law and formulating legal principles. See ER 201(a), Comment; Fed. R. Evidence 201(a), Advisory Committee's Note. Under the legislative facts doctrine, the Court may take judicial notice of legislative facts either sua sponte or on submission by a party. TEGLAND at § 49; MCCORMICK at § 331.

communications with his counsel (and others) in relation to *court proceedings*. But his constitutional theories are boundless and would require the following court services, regardless of whether the party is, like he is, represented by counsel - - full interpreter services for all attorney-client and other communications (in and out of court), plus foreign language notices, rulings, and briefings in small claims, traffic, and all other civil cases - - big or small - - in every municipal, district, and superior court, as well as in every proceeding in the Court of Appeals and the Supreme Court. Also, essentially every local and state police contact with every limited-English-proficiency person, as well as every other local and state governmental contact with every such person, would require interpreter services, regardless of which of the over 6900 living languages of the world that person spoke, read, or wrote as a primary language.

Mestrovac mischaracterizes the Department's point about the *ramifications* of his constitutional theories by attempting to change the focus to the particular *relief* he seeks from the Department and Board. Mest. Op. Br. at 14-15. While his response grossly underplays the ramifications of his theories and of the broad Superior Court due process ruling (set forth in Appendix A) even on just the Department and Board, his focus on the relief that he seeks is beside the point, unless he takes his

request to the Legislature, which body might take a measured, step-at-a-time approach to this area.

What is critical here is that Mestrovac is making *constitutional* arguments that, if accepted by this Court, will have ramifications across the entire spectrum of all governmental entities and activity. His *constitutional* theories cannot be limited to the relief he seeks in this case. He provides no principled analysis under which his theories can be limited to just Department and Board programs. *See* Appendix A.

C. Mestrovac has not shown a Due Process violation

1. English notices are constitutionally sufficient

Mestrovac argues that the Department's English-written time loss payment orders to him and his attorney are insufficient under due process, claiming, "Sending 'English only' notices to non-English speaking workers is obviously not 'notice.'" Mest. Op. Br. at 15-16. Notice required by due process is one "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *State v. Nelson*, 158 Wn.2d 699, 703, 147 P.3d 553 (2006) (citations omitted).

Mestrovac ignores the federal and other states' authorities that consistently hold that English-written notices to limited-English-proficient persons comport with due process. DLI Op. Br. at 30.⁴

Mestrovac simply cites to *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), for the proposition that "the use of English only to communicate with non-English speakers 'effectively bars communication itself.'" Mest. Op. Br. at 16 n.13. The Department's notice and limited interpreter services, however, comport with due process, and his reliance on *Hull* is misplaced.

Hull did not involve a due process issue. Instead, it involved the constitutionality, under the First Amendment and under the Equal Protection Clause of the federal constitution, of Arizona's constitutional amendment that "*explicitly and broadly prohibit[ed] government employees from using non-English languages,*" thus prohibiting the "use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English." *Hull*, 957 P.2d at 996 (emphasis added). The *Hull* Court held that the amendment impermissibly restricted speech of public employees and

⁴ *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973); *Toure v. United States*, 24 F.3d 444, 446 (2nd Cir. 1994); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2nd Cir. 1983), *cert. denied*, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984); *Alfonso v. Dep't of Labor & Indus. Bd. of Review*, 444 A.2d 1075, 1076-78 (N.J. 1982); *Commonwealth v. Olivo*, 337 N.E.2d 904, 909-10 (Mass. 1975); *Hernandez v. Dep't of Labor*, 416 N.E.2d 263, 266-67 (Ill. 1981); *Guerrero v. Carleson*, 512 P.2d 833, 837 (Cal. 1973); *Frontera v. Sindell*, 522 F.2d 1215, 1221 (6th Cir. 1975).

others, and was not narrowly tailored to meet its goal to promote English as a common language, because “English can be promoted *without prohibiting the use of other languages* by state and local governments.” *Hull*, 957 P.2d at 1001 (emphasis added). *Hull* pointed out, and turned in significant part on, the “critical difference between encouraging the use of English and repressing the use of other languages.” *Hull*, 957 P.2d at 991.

Unlike the state constitutional amendment in *Hull*, the Department’s English-written notices and limited interpreter services do not *prohibit* the use of any other languages. Arizona’s broad ban on public employees’ use of other languages in *Hull* is qualitatively different from Mestrovac’s claim of an “*affirmative right to compel* state government to provide information in a language that [he] can comprehend.” *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936 (9th Cir. 1995) (en banc) (emphasis added), *vacated as moot*, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997).⁵ This is a difference recognized in constitutional law between *affirmative and negative rights*:

The clearest example of the distinction between affirmative and negative rights may be seen in the case of a state legislator who may seek office and be elected in part because of his ability to speak with his constituents in their native languages. *No one could order such an official to*

⁵ Although the Supreme Court has vacated the Ninth Circuit opinion in *Arizonans for Official English* on mootness grounds, the *Hull* Court explicitly relied on the opinion, stating, “On the merits of the case, however, we agree with the result and with much of the reasoning of the Ninth Circuit opinion.” *Hull*, 957 P.2d at 987 n.1.

Speak Spanish or Navajo. Neither, however, can the state preclude him or his staff from transmitting information regarding official state business to persons resident in his district in whatever language he deems to be in the best interest of those he was elected to serve.

Arizonans for Official English, 69 F.3d at 937 (emphasis added).

Further, *Hull* recognizes that “the importance of establishing common bonds and a common language between citizens is clear.” *Hull*, 957 P.2d at 990. *Hull* also recognizes that it is “not [the Court’s] prerogative to impinge upon the Legislature’s ability to require, under appropriate circumstances, the provision of services in languages other than English.” *Hull*, 957 P.2d at 997 (emphasis added). This is consistent with the Department’s position that any *requirement* for multi-language services should come from the Legislature, not the courts. DLI Op. Br. at 32-33; *Alfonso*, 444 A.2d at 1977; *Olivo*, 337 N.E.2d at 910 n.6; *Valdez v. N.Y. City Hous. Auth.*, 783 F. Supp. 109, 121 (S.D.N.Y. 1991).⁶

The first of the Department notices was addressed to Mestrovac by his name, address, and case number, while the second and third were

⁶ Mestrovac argues that the Department’s practice of providing certain interpreter services in the medical context or of providing Spanish-written notices to certain Spanish-speaking claimants contradicts its argument that these matters should be left to the Legislature. Mest. Op. Br. at 22-23. But there is nothing inconsistent about the Department providing limited interpreter services that have yet to be required by law in its administration of the workers’ compensation law (Title 51 RCW) and at the same time arguing that the *requirement* for such services (or more) should come from the Legislature. As the Department demonstrated in its opening brief (at 43) and will discuss below, providing such limited services does not run afoul of the equal protection constitutional mandate.

addressed to his attorney per her request. All of these notices would put a reasonable non-English-speaking claimant on notice that a further inquiry is required. *See Guerrero*, 512 P.2d at 836 (“The government may reasonably assume that the non-English speaking individual will act promptly obtain [language] assistance when he receives the notice in question.”); *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999) (English notice satisfies due process if it “would put a reasonable recipient on notice that further inquiry is required”). The Department’s notices were reasonably calculated to apprise Mestrovac of the decisions and afford him an opportunity to present his objections. The notices comported with due process. Mestrovac provided no authority stating otherwise.

2. The *Mathews* test does not require an interpreter for all of Mestrovac’s communications with his attorney

Mestrovac cites to the balancing test under *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976), and he argues that due process requires the Department and Board to provide limited-English-proficiency claimants with interpreters for all conversations with their attorneys. Mest. Op. Br. at 15-16. He misapplies the *Mathews* test.

As for the first *Mathews* factor, Mestrovac claims that the Department “minimizes” the nature and weight of his property interest in his claim for benefits. Mest. Op. Br. at 16-17. He cites to *Buffelen*

Woodworking v. Cook, 28 Wn. App. 501, 625 P.2d 703 (1981), as having determined this factor. Mest. Op. Br. at 16-17. The *Buffelen* Court held that a workers' compensation claimant has sufficient property interest in his *claim* for benefits to trigger due process, although he has yet to have a *vested* right to such benefits. *Buffelen*, 28 Wn. App. at 504-05. But the *Buffelen* Court did not engage in any analysis as to the difference between a worker's *vested* right to benefits and his or her *claim* for benefits in terms of their nature and weight for purposes of due process.

Mestrovac's interest in his *claim* for more benefits than was awarded to him, no matter how important it may be, is not as great as, and must be distinguished from, the *vested* right to benefits involved in *Mathews*.⁷ See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60-61, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) (workers' interests in "their *claims* for payment" are "fundamentally different" from a *vested* right to benefits); *Lander v. Indus. Comm'n of Utah*, 894 P.2d 552, 555 (Utah Ct. App. 1995) (worker's interest in his claim for benefits "falls short of a vested right to benefits as in *Mathews*"); see also *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 475, 843 P.2d 1056 (1993) ("Where the Department has neither considered nor determined whether a worker is

⁷ Even for termination of a *vested* right to disability benefits, due process does not require a prior evidentiary hearing. *Mathews*, 424 U.S. at 332-49.

permanently and totally disabled, that worker has *a future expectation of benefits, not a vested right.*").

Further, the nature of Mestrovac's interest affected by the Department's challenged wage computation must be considered in light of the fact that he will be awarded full retroactive relief if he ultimately prevails on appeal. *See Mathews*, 424 U.S. at 340 (relevant to first factor inquiry is fact a disability recipient whose benefits are terminated will be awarded full retroactive relief if he ultimately prevails⁸). This is not a case where the State "will not be able to make [a driver whose license was suspended] whole" through a postsuspension review process. *Mackey v. Montrym*, 443 U.S. 1, 11, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979).⁹

As to the second *Mathews* factor, Mestrovac points out that the Department, *in this particular case*, made an error in determining what should be included in his wages, and he speculates that if *he had not retained his attorney* and paid for an interpreter *to communicate with her*, this error might not have been corrected through the current Board process. Mest. Op. Br. at 17. But the specific dictates of due process must

⁸ Note also that the benefits at stake in *Mathews* and here are not the last safety net for the worker. *See Mathews*, 424 U.S. at 342 ("[T]he disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level.").

⁹ While recognizing this fact, the Supreme Court in *Mackey* nonetheless concluded that due process does not require a prior evidentiary hearing for suspending a driver's license under Massachusetts' implied consent law. *Mackey*, 443 U.S. at 11-19.

be shaped by the “risk of error inherent in the truthfinding process as applied to the generality of cases” rather than the “rare exceptions.” *Mackey*, 443 U.S. at 14 (citing *Mathews*, 424 U.S. at 344).

Due process “simply does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations.” *Mackey*, 443 U.S. at 13. When “prompt postdeprivation review is available for correction of administrative error,” the courts have required “no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that *the facts* justifying the official action are as a responsible governmental official warrants them to be.” *Mackey*, 443 U.S. at 13 (emphasis added). Where, as here, the challenged decision involves primarily questions of *law* (i.e., whether overtime or vacation pay should be included in the “wages”), the risk of error inherent in the *truthfinding* process is minimal, and legal questions must ultimately be resolved by the court. *See Mackey*, 443 U.S. at 15 (“Ultimately, any legal questions must be resolved finally by the Massachusetts courts on judicial review of the decision of the Board of Appeal after any appeal taken from the ruling of the Registrar.”).

Mestrovac was provided with an evidentiary hearing *and an interpreter, at the Board’s expense, for all the on-the-record testimony and statements throughout the Board proceedings*. He was represented by

an attorney early on during Department claim administration, and, from the outset of the Board proceedings, he had the right (which he exercised) to seek Board review of the Department decisions, as well as to seek judicial review of the Board decision on the disputed wage issue. He fails to explain why this process is insufficient to reduce the risk of error inherent in the truthfinding process. Nor does he explain why he deserves a special right to have an interpreter translate his private conversations with his attorney, when an indigent workers' compensation claimant (English-speaking or otherwise) has no constitutional right to counsel at all. See *In re Grove*, 127 Wn.2d 221, 237-38, 897 P.2d 1252 (1995) (indigent claimant has no constitutional right to counsel in workers' compensation or other civil cases); *Jara v. Mun. Court*, 578 P.2d 94, 95-97 (Cal. 1978) (in civil cases, due process does not require a court-paid interpreter for attorney-client communications or for other translation).

As to the third *Mathews* factor, Mestrovac simply claims that there is no evidence that the cost for extra interpreter service is "staggering." Mest. Op. Br. at 17. But the cost need not be "staggering" to be weighed under the *Mathews* balancing test. The "Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." *Mathews*, 424 U.S. at 348.

Weighed against Mestrovac's interest in his claim for benefits, which is not so great as the vested right to benefits involved in *Mathews*, and the minimal value, if any, of having an interpreter translate all of his conversations with his attorney in reducing the risk of error inherent in the fact-finding process, Washington's interest in conserving scarce fiscal and administrative resources justifies not providing such additional service. The risk of error in Mestrovac's claim was adequately safeguarded against through the Board's evidentiary hearing with an interpreter translating all the proceedings for him, except for his off-the-record conversations with his attorney. No more process is due him.

As a reason for his failure to provide evidence of his alleged interpreter cost, Mestrovac asserts he was *prevented by the IAJ* from doing so. Mest. Op. Br. at 17. As stated above, the IAJ properly declined to address his interpreter arguments as outside the Board's jurisdiction. Further, nothing prevented him from presenting such evidence at the superior court. RCW 51.52.115 ("[I]n cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court."). He *chose not* to do so.

In sum, the challenged processes comport with due process.

3. Mestrovac fails to show actual prejudice to his Due Process rights; litigation cost is not prejudice

Mestrovac claims prejudice from the Department's English-written notices and the Board's not providing him with interpreter service for his off-the-record conversations with his attorney. Mest. Op. Br. at 27-28.

"Minor procedural errors comply with due process." *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005); *see also State v. Storhoff*, 133 Wn.2d 523, 527, 946 P.2d 783 (1997). To establish a due process violation, Mestrovac must show *actual prejudice to his due process rights*. *Motley-Motley*, 127 Wn. App. at 81. He must show that the Department *in fact* "deprived [him] of *notice* of [the challenged decision] or [his] opportunity to request a formal hearing." *Storhoff*, 133 Wn.2d at 528. He must also show that the Board deprived him of his ability to prepare or present his case. *See Motley-Motley*, 127 Wn. App. at 81 ("Prejudice relates to the inability to prepare or present a defense.").

Upon receipt of the notice of the Department's challenged decision, Mestrovac timely appealed it through his attorney and requested a hearing. He was provided with an evidentiary hearing at the Board with an interpreter translating all the proceedings for him, except for his private, off-the-record conversations with his attorney. After submitting extensive briefing on the merits of his appeal (the wage issue currently on cross-appeal), he lost on that issue both at the Board and the Superior Court and does not claim that having additional interpreter service would

likely have made any difference in the outcome. He thus fails to show actual prejudice to his due process rights.

Mestrovac relies on *Scully v. Employment Security Department*, 42 Wn. App. 596, 712 P.2d 870 (1986), to argue that the interpreter cost he allegedly incurred for his appeal from the Department's wage determination constitutes prejudice. Mest. Op. Br. at 28. He is incorrect, and his reliance on *Scully* is misplaced.

Scully did not involve a due process issue. *Scully* addressed whether an unemployment benefits claimant showed "good cause" for filing a late appeal under the Employment Security Act, RCW 50.32.035, which turned in part on the presence or absence of prejudice caused by the delay. *Scully*, 42 Wn. App. at 601-04. In finding that the Employment Security Department failed to show prejudice, the *Scully* court said, "*If Scully is entitled to unemployment compensation, denial of these benefits is undoubtedly prejudicial to him.*" *Scully*, 42 Wn. App. at 602 (emphasis added). But this statement does not mean that *litigation cost* is prejudice.

Mestrovac's alleged out-of-pocket expenses for interpreter are a consequence of his filing his appeal and choosing to hire an interpreter.¹⁰ Such litigation costs do not constitute prejudice. *See State v. Cantrell*, 111 Wn.2d 385, 390-91, 758 P.2d 1 (1988) (vague allegation of interference

¹⁰ In fact, Mestrovac claims entitlement to reimbursement of his alleged interpreter expenditures as *costs*. Mest. Op. Br. at 28-30.

with the accused time did not constitute a showing of prejudice, because “[i]nconvenience and disruption of one’s daily life are a *necessary consequence of being charged with an offense.*”).

In sum, Mestrovac fails to show prejudice to his due process rights.

D. Mestrovac fails to show the Department’s English-notice and other communications violated his Equal Protection rights

1. Mestrovac has not shown intentional discrimination or the absence of rational basis

Mestrovac argues that the Department’s sending English-written notices to him was tantamount to a discrimination prohibited by the equal protection law. Mest. Op. Br. at 18-22. He complains that the Department sends some claimants Spanish-written notices while not sending him Bosnian-written notices. Mest. Op. Br. at 20. The Department’s English-written notices and other communications satisfy equal protection.

“The standard of review in a case that does not employ suspect classification or fundamental right is rational basis, also called minimal scrutiny.” *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004) (citation omitted). Mestrovac argues that language is a “suspect” class, claiming that his limited English proficiency is “characteristic of both his alienage and his national origin[.]” Mest. Op. Br. at 21. But he provides no authority standing for such a proposition.

On the other hand, as the Department demonstrated in its opening brief (at 38-40), federal and other state courts have consistently held that “[l]anguage, by itself, does not identify members of a suspect class.” *Soberal-Perez*, 717 F.2d at 41; *Moua v. City of Chico*, 324 F. Supp.2d 1132, 1137-38 (E.D. Cal. 2004); *Olivo*, 337 N.E.2d at 911; *Valdez*, 783 F. Supp. at 122. Mestrovac fails to distinguish these cases.

Mestrovac conclusorily asserts that the alleged discrimination is “not merely the ‘impact’ of a neutral policy.” Mest. Op. Br. at 20. But even assuming that the Department’s sending English-written notices to him implicated a “suspect” class, to trigger strict scrutiny, Mestrovac must demonstrate *intentional* discrimination. *See, e.g., Jana-Rock Constr., Inc. v. Dep’t of Econ. Dev.*, 438 F.3d 195, 204 (2nd Cir. 2006). He has to prove that the Department sent him English-written notices “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) (emphasis added). He fails to make such a showing of intentional discrimination. It is not enough for him to say the Department sends Spanish notices to some claimants.

Mestrovac argues that the Department’s English-written notice to him does not meet the rational basis test. Mest. Op. Br. at 21-22. Under the test, the Department’s challenged practice is presumed to be

constitutional and must be upheld “unless it rests on grounds *wholly irrelevant* to achievement of legitimate state objectives.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 226, 5 P.3d 691 (2000) (emphasis added) (citation omitted). The practice “will be upheld if *any conceivable* state of facts reasonably justifies [it].” *Tunstall*, 141 Wn.2d at 226 (emphasis added); *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (“A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.”). Mestrovac “has the burden of proving that the [practice] is ‘purely arbitrary.’” *Tunstall*, 141 Wn.2d at 226 (citation omitted).

As the Department demonstrated in its opening brief (at 41-42),¹¹ its use of English in its communications with claimants is rationally related to the legitimate state objective of dealing with one common language for efficiency, and the federal and other state courts have consistently upheld the constitutionality of English notices and services to limited-English-proficiency persons. See *Carmona*, 475 F.2d at 739; *Guadalupe Org. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1026-29 (9th Cir. 1978); *Frontera*, 522 F.2d at 1218-1220; *Soberal-Perez*, 717 F.2d at 42-43; *Olivo*, 337 N.E.2d at 911; *Guerrero*, 512 P.2d at 837-39.

¹¹ By claiming that the Department is “silent on this [rational basis] subject,” (Mest. Op. Br. at 21), Mestrovac appears to ignore the Department’s specific rational basis argument in its opening brief (e.g., DLI Op. Br. at 41-43).

Mestrovac tries to dismiss these authorities by simply claiming that they were influenced by *strong* “‘English only’ sentiments” in the particular jurisdictions and are “sharply at odds with the public policy of our State” and run “counter to federal policy”. Mest. Op. Br. at 18-19. But his assertion ignores the fact that the majority of these cases are *federal*, and, in any event, his assertion lacks merit.

2. Mestrovac misplaces reliance on qualified statutes for his unqualified Equal Protection theory

Mestrovac appears to argue that *policies* manifested in RCW 2.43.010, RCW 49.60.010, and Presidential Executive Order (EO 13166 - 2000 WL 34508183) somehow create a constitutional duty on the part of the Department to provide him Bosnian-written notices. Mest. Op. Br. at 18-19 nn.15, 16. But he does not explain how these statutes or the federal-statute-based EO 13166 relate to his *constitutional* equal protection argument. Further, they do not support his argument.

As discussed *infra* Part I.H, RCW 2.43 creates *limited* rights to interpreter services in “legal proceedings,” which proceedings do not include the Department’s administration of worker benefits claims. RCW 49.60.010 identifies, as “a matter of state concern,” discrimination “in employment [and certain other specified contexts]” based on “race, creed, color, national origin, families with children, sex, marital status, sexual

orientation, age, or presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.” But Mestrovac fails to cite any relevant authority or to otherwise demonstrate that the Department’s sending English-written notices to him and his counsel constituted any of the prohibited forms of discrimination, or that such would be actionable in a workers’ compensation case.

RCW 28A.180.040, the *Transitional Bilingual Instruction Act*, requires school districts to “make available to each eligible pupil *transitional* bilingual instruction to *achieve competency in English*.” RCW 28A.180.040(1). The bilingual instruction required by the Act is thus *transitional*, designed to achieve *English competency*. None of these statutes suggests that a workers’ compensation claimant can compel the Department to communicate in his or her primary language. Nor do the statutes support Mestrovac’s argument that the Department’s use of English as the common language is against Washington’s statutory policy.

Nor does EO 13166 support Mestrovac’s claim. As discussed in the Department’s opening brief (at 36-37 n.11), EO 13166 expressly provides that it is “intended only to improve the internal management of the executive branch and *does not create any right or benefit, substantive or procedural, enforceable at law or equity* by a party against the United States, its agencies, its officers or employees, or any person.” EO 13166,

§ 5 (emphasis added). The express language of EO 13166 thus clearly rejects the claim Mestrovac makes – that EO 13166 creates a right for limited-English-proficiency persons to compel the government to provide multi-lingual services. *See also Alexander v. Sandoval*, 532 U.S. 275, 280-81, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (no privately enforceable rights created by Title VI of federal Civil Rights Act).

3. Spanish notices do not create an Equal Protection right to Bosnian notices

Mestrovac complains of the Department's sending Spanish-written notices to certain Spanish-speaking claimants as discrimination against Bosnian-speaking persons. Mest. Op. Br. at 20. But as discussed in the Department's opening brief (at 43), equal protection "does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and *free from invidious discrimination*." *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) (emphasis added). "A classification does not fail rational-basis review because 'it is not made with mathematical nicety or because in practice it results in some inequity.'" *Heller*, 509 U.S. at 321 (quoting *Dandridge*, 397 U.S. at 485); *Anderson v. King County*, 158 Wn.2d 1, 31, 138 P.3d

963 (2006) (“In addition, within limits, a statute generally does not fail rational basis review on the grounds of over- or under- inclusiveness.”).

In view of the large number of Spanish-speaking persons the Department deals with, the Department may, but is not required to, seek to improve its communications vis-à-vis limited-English-proficient claimants by first creating Spanish-written notices for Spanish-speaking claimants. But it does not follow that in doing so the Department somehow is engaging in *invidious* discrimination against other-language-speaking claimants such as Japanese, French, German, or Bosnian speakers. “The problems of government are practical ones and may justify, if they do not require, rough accommodations - - illogical, it may be, and unscientific.” *Heller*, 509 U.S. at 321 (citation omitted).

4. Mestrovac must take his request to the Legislature

Mestrovac asserts, *without any factual basis*, “In today’s world of computer technology and readily available computer translation programs, it is both simple and inexpensive to translate forms for workers like as [sic] Mestrovac.” Mest. Op. Br. at 22. Even if he had facts to support his claim, his assertion should more properly be addressed to the Legislature, which some day may require multi-lingual notices in the workers’ compensation area but has yet to do so. The “rational-basis review in equal protection analysis is not a license for courts to judge the wisdom,

fairness, or logic of legislative choices.” *Heller*, 509 U.S. at 319 (citation omitted). “Nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.” *Heller*, 509 U.S. at 319 (citation omitted).

5. Neither *Macias* nor *Willoughby* supports Mestrovac’s Equal Protection argument

Mestrovac cites to *Macias v. Department of Labor & Industries*, 100 Wn.2d 263, 668 P.2d 1278 (1983), and *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 730, 57 P.3d 611 (2002), as rejecting the Department’s “claims of added expense to justify narrow construction of the Act to deny or restrict benefits for injured workers.” Mest. Op. Br. at 22 n.19. But the Department does not advance any narrow construction of the Industrial Insurance Act, Title 51 RCW. Nor does Mestrovac even claim that *this Act* provides for interpreter services.

In any event, neither *Macias* nor *Willoughby* supports his argument that he has an equal protection right to compel the Department to provide him with Bosnian notice. *Macias* involved fundamental constitutional right to travel and strict scrutiny analysis, *Macias*, 100 Wn.2d at 267-75, which is inapplicable here. *See also* DLI Op. Br. at 38 n.12.

Willoughby involved the constitutionality of a statute that denied disbursement of permanent partial disability benefits to prisoners who had no statutory beneficiaries and were unlikely to be released from prison, although the prisoners were otherwise eligible for the benefits. *Willoughby*, 147 Wn.2d at 728-30. In holding that the statute violated the equal protection clause, the *Willoughby* Court held that *saving* state funds was not a sufficient justification for *denying* the prisoners benefits that they were otherwise entitled to. *Willoughby*, 147 Wn.2d at 741. Unlike the statute in *Willoughby*, which *denied* the prisoners of the benefits to which they were otherwise entitled *simply because of their prisoner-without-beneficiary status*, the Department here did *not*, just to save money, deny Mestrovac any benefits to which he was otherwise entitled, just because he speaks Bosnian. His reliance on *Macias* and *Willoughby* is thus misplaced.

In sum, Mestrovac fails to show that the Department's English-written notice to him violated equal protection guaranties.

E. RCW 2.43.040 does not support Mestrovac's position regarding Department-level interpreter services

As the Department explained in its opening brief, RCW 2.43 does not apply to Department-level administration of claims because the claim administration process is not a "legal proceeding" or "initiated by" the

Department. DLI Op. Br. at 45-46. Mestrovac does not squarely address the plain language of RCW 2.43 that limits the statute's coverage to "legal proceedings." Rather, his argument for Department-level interpreter services under RCW 2.43 relies on two premises: (1) a government agency may not provide interpreter services unless a statute explicitly says so, and (2) RCW 2.43 is the only statute that explicitly authorizes a governmental agency to provide interpreter services. Mest. Op. Br. at 23-27.

The first and critical premise of Mestrovac's argument is wrong, and therefore his argument fails. Mestrovac overlooks the fundamental proposition that the Department, as a government agency, has implied powers to carry out its duties under governing statutes *by using all lawful and necessary means to effectuate the statutory purposes*:

Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority. . . . Agencies have implied authority to carry out their legislatively mandated purposes. . . . When a power is granted to an agency, "everything lawful and necessary to the effectual execution of the power" is also granted by implication of law. . . . Likewise, implied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature. . . . Agencies also have implied authority to determine specific factors necessary to meet a legislatively mandated general standard.

Tuerk v. Dep't of Licensing, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994) (extensive list of case citations omitted). In addition, in examining

an agency's powers, a court reads all statutes on the subject together in order to determine legislative intent. *Greenwood v. Bd. for Cmty. Coll. Educ.*, 82 Wn.2d 667, 671 513 P.2d 57 (1973).

RCW 43.22.030 vests in the Director of the Department the power and duty to "[e]xercise all the power and perform all the duties prescribed by law with respect to the administration of workers' compensation and medical aid in this state." RCW 51.04.010, adopted in 1911, withdraws workers' compensation from private litigation and states as a goal the Department's providing "sure and certain relief" to injured workers. RCW 51.04.020 provides that the Director of the Department shall "(3) [r]egulate the proof of accident and extent thereof . . ." and "[s]upervise the medical, surgical, and hospital treatment" RCW 51.04.030(1) requires the Department and self-insurers to provide prompt and efficient medical care for injured workers "without discrimination or favoritism." RCW 51.32.095(1) vests broad discretionary power in the Department to make vocational rehabilitation services available to injured workers to enable them to "become employable at gainful employment." RCW 51.32.114 requires the Department to "develop standards for the conduct of special medical examinations to determine permanent disabilities. . . ." RCW 51.36.010(1) provides that an injured worker is to receive "proper

and necessary medical and surgical services . . . [from a physician] of his or her own choice”

These and other statutes relating to administration of industrial insurance impliedly authorize the Department to utilize and authorize the utilization of the services of interpreters in those contexts in which the Department by policy deems necessary. *Tuerk*, 123 Wn.2d at 124-25. No statute *expressly and specifically authorizes* the Department, in its administration of the workers’ compensation law, to use tools (such as telephones, computers, faxes, videoconference devices, scanning devices, or a web site) or to hire specialized personnel (such as accountants, in-house attorneys, and in-house and consulting specialists) to provide, and oversee the provision of, a broad array of services and to communicate with, and evaluate the claims of, injured workers and others. But no one can reasonably claim that the Department lacks authority to employ these means in its claim administration. *See Tuerk*, 123 Wn.2d at 124-25. Mestrovac’s argument – that only RCW 2.43 authorizes a government agency such as the Department to use interpreter services and a government agency lacks authority to use any interpreter services not covered by the statute – is unreasonable and without any merit.

II. DEPARTMENT'S RESPONSE TO MESTROVAC'S WAGE COMPUTATION CROSS-APPEAL

A. COUNTERSTATEMENT OF ISSUES (CROSS-APPEAL)

1. RCW 51.08.178(1) expressly excludes "overtime pay" from wages. Did the superior court properly count Mestrovac's overtime hours by multiplying the hours by regular, not his overtime premium, pay rate?
2. Did Mestrovac waive or otherwise fail to preserve his challenge to the finding below that he regularly worked 10.39 overtime hours per month?
3. Does substantial evidence support the Superior Court finding that Mestrovac regularly worked 10.39 hours of overtime per month?
4. Where there is no evidence that Mestrovac worked on paid holidays and vacation days or that he could cash out his vacation days at any time, would it be impermissible double-counting to include his employer's contributions to those benefits in his RCW 51.08.178(1) wage computation?
5. This Court held in *Erakovic* that the employer taxes for various government programs do not constitute "wages." Does Mestrovac provide any persuasive reason why this Court should overturn *Erakovic* or why the taxes for unemployment benefits should be distinguished from those held not to be RCW 51.08.178 "wages" in *Erakovic*?

B. COUNTERSTATEMENT OF THE CASE (CROSS-APPEAL)

Mestrovac was injured on the job and filed a workers' compensation claim, which the Department allowed. BR 6. The Department paid him some time-loss compensation. BR 6-7.

Mestrovac appealed to the Board from three Department time-loss orders issued in October and November 2003, seeking to increase his monthly wage computation under RCW 51.08.178(1) and to thus raise his time-loss compensation rate. BR 7. The Department had computed his monthly wage at \$1584 based on his working 8 hours per day, 5 days per week at \$9 per hour. BR 6-7. He sought to have included in his wage computation some things the Department overlooked (and are no longer at issue) – i.e., the value of health benefits and bonuses. BR 132-52.

Mestrovac also sought to have included in his wage computation the value of overtime earnings, as well as vacation and holiday pay. BR 146, 148. And he also wanted included the value of his employer's taxes for Medicare, Social Security, industrial insurance and unemployment insurance. BR 149.

The Board's Industrial Appeals Judge (IAJ) considered considerable documentary evidence, as well as testimony from Mestrovac, his labor economist, the Department adjudicator on his claim, and the HR Manager for his employer. The IAJ issued a proposed decision recommending that the Board reverse the Department's time-loss orders and establish a higher monthly wage. BR 132-52.

The IAJ found that, as of the injury date, Mestrovac was paid, as the Department had determined, wages of \$9 per hour, 8 hours per day,

and 5 days per week. BR 151-52. The IAJ found that Mestrovac also regularly worked 10.39 overtime hours per month that must be included in the wage computation under RCW 51.08.178(1). BR 151-52. The IAJ also found that at the time of injury Mestrovac was receiving health care benefits that must be included in wage computation per the Washington Supreme Court's *Cockle*¹² decision. BR 151-52.

The IAJ further determined that Mestrovac's monthly "wages" included bonuses (per 51.08.178(3)), as well as his holiday and vacation pay. *Id.* But the IAJ did not include in the wage computation any values for any employer tax or any other employer contribution. BR 152. The IAJ proposed that the Board raise the monthly wage to \$2119.41. BR 152.

Both Mestrovac and the Department filed Petitions for Review asking the 3-member Board to review the IAJ's proposed decision. BR 36-90 (Mestrovac); 95-101 (Department). The Department challenged the IAJ's wage conclusions regarding vacation and holiday pay. BR 95-101. Mestrovac challenged, inter alia, (1) the pay rate (but not the number of hours) that the IAJ had assigned to his regular overtime work and (2) the IAJ's exclusion of various employer taxes from his wage. BR 61-67.

The Board granted review and by 2-1 decision granted relief to the Department only. BR 1-10. The final Board order affirmed the IAJ's

¹² *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001).

decision except that the Board held that the IAJ had erred in directing the Department to include vacation and holiday pay in the monthly wage. BR 1-10. This final order essentially concluded that the Department had in effect already included the hours of paid holiday and vacation days in calculating the base wage under RCW 51.08.178(1). BR 1-10. The Board order reduced the monthly wage to \$2012.01. BR at 8-9.

Mestrovac appealed to King County Superior Court. CP 1-3. After a bench trial, the Superior Court adopted the Board's findings and conclusions of law on all of the wage computation issues. CP 528. Mestrovac appealed to this Court. CP 812-825.

C. STANDARD OF REVIEW

Review of superior court decisions in workers' compensation cases is under the ordinary standard for civil cases. RCW 51.52.140; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). With one exception where Mestrovac appears to be raising a substantial evidence issue (*see infra* Part II.F.1.a), the wage computation issues he raises are of statutory construction. Statutory construction is a question of law reviewed de novo. *Cockle*, 142 Wn.2d at 807.

In determining the meaning of a statute, courts first look to the language. *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 821, 748 P.2d 1112 (1988). A statute clear on its face is not

subject to construction. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). The provisions of Washington's Industrial Insurance Act are "liberally construed," (RCW 51.12.010), but such rule of construction does not authorize an unrealistic interpretation that produces strained or absurd results and thus defeats the plain meaning and intent of the Legislature. *See generally Senate Republican Comm. v. Pub. Disclosure Com'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).

Department and Board interpretations of the Industrial Insurance Act are entitled to great deference, and the courts "must accord substantial weight to the agenc[ies'] interpretation of the law." *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994) (deference given to Department interpretation); *Ackley-Bell v. Seattle School Dist.*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997) (deference is due interpretations by both the Department and Board).

D. ARGUMENT REGARDING WAGE COMPUTATION

1. The Superior Court properly calculated Mestrovac's earnings from overtime work under RCW 51.08.178(1)

Mestrovac does not clearly articulate his overtime-pay argument. But he appears to raise both (1) legal and (2) factual challenges to the Superior Court's factoring of his overtime earnings into its determination of his wage. *Mest. Op. Br.* at 43-44. His arguments lack merit.

RCW 51.08.178 guides the determination of the “*monthly wages* the worker was receiving from all employment *at the time of injury*.” RCW 51.08.178(1) (emphasis added). Since 1971, for regularly employed workers on a fixed hourly wage such as Mestrovac, “monthly wage” has been computed under the formula of RCW 51.08.178(1). This formula determines a “daily wage” by multiplying the “hourly wage rate” at the time of injury by the “hours . . . normally employed.” RCW 51.08.178(1).

Mestrovac appears to argue that RCW 51.08.178(1) requires that his time-and-a-half premium overtime pay rate (\$13.50) rather than his regular pay rate (\$9.00) must be used to compute wages for his overtime work. Mest. Op. Br. at 43-44. His argument ignores the express statutory language that, except for part-time, seasonal, or intermittent employments (which does not apply here), “wages . . . shall not include overtime pay.” RCW 51.08.178(1). This statutory phrase must be given meaning and effect. *Taylor v. City of Redmond*, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977) (“[C]ourts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of same.”).

There are only two plausible interpretations of the “overtime pay” exclusion in RCW 51.08.178(1). One interpretation would simply exclude overtime *hours* and overtime *pay* from daily wage computation altogether. The second interpretation would include overtime hours but exclude the

overtime *premium pay*. The statutory phrase “overtime *pay*,” not “overtime *hours*,” and the rule of liberal construction (RCW 51.12.010) favor the second interpretation. There is no support for Mestrovac’s argument that his wage should include his overtime hours *as multiplied by the time-and-a-half overtime premium rate* (\$13.50), rather than his regular pay rate (\$9.00).

As noted, Mestrovac also challenges the Superior Court finding 1.3 (CP 528) that adopted the Board’s finding 3 (BR 7) that “Mestrovac worked an average of 10.39 overtime hours per month.” He claims he worked 20.9 overtime hours per month. Mest. Op. Br. at 43 n.39. But this finding is a verity because Mestrovac has not assigned error to it. RAP 10.3(a)(3); *State v. Rodgers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002).

In addition, Mestrovac has waived his challenge to this finding by failing to challenge it, both in his petition for review to the Board (BR 36-90) and in his Superior Court briefing (CP 466-509). *See* RCW 51.52.104 (“Such petition for review shall set forth in detail the grounds therefore and the party . . . shall be deemed to have waived all objections or irregularities not specifically set forth therein.”); RAP 2.5(a) (appellate court may refuse to review any claim of error not raised at trial); *Stelter v. Dep’t of Labor & Indus.*, 147 Wn.2d 702, 711, n.5, 57 P.3d 248 (2002) (declining to reach an issue that “was not raised or briefed to the Board or in judicial proceedings below”); *Allan v. Dep’t of Labor & Indus.*, 66 Wn.

App. 415, 422, 832 P.2d 489 (1992) (“Allan waived this objection because it was not set out in her petition for review . . . as required by RCW 51.52.104.”); *Cosmopolitan Eng’g Group, Inc. v. Ondeo*, 128 Wn. App. 885, 893-94, 117 P.3d 1147 (2005) (trial brief did not adequately preserve the issue under RAP 2.5(a)).

In any event, because substantial evidence supports the challenged finding that Mestrovac worked 10.39 overtime hours per month, the finding must be upheld.¹³ Mestrovac’s own expert, Robert Moss, testified based on his review of 52 weeks of bi-weekly pay stubs (BR Ex. 37¹⁴) that Mestrovac worked an average of 4.81 overtime hours every two weeks. BR Tr 8-06-04 Moss at 37. The employer’s Human Resources Manager, Cindy Hartzler, said “yes” in response to Mestrovac’s counsel’s question whether five hours every two weeks “sounds about right.” BR Tr 8-06-04 Hartzler. This testimony, as well as the pay stubs in Exhibit 37

¹³ Review of a trial court fact determination in an industrial insurance case is under the ordinary rule for civil cases (RCW 51.52.140) and hence “is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court’s de novo review” *Ruse*, 138 Wn.2d at 5 (citation omitted). Evidence is substantial if “sufficient to persuade a fair-minded, rational person of the truth of the matter.” *R & G Probst v. Dep’t of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). This Court must take the “record in the light most favorable to the party who prevailed in superior court”: here, the Department. *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

¹⁴ It appears that Mestrovac has recently looked at the pay stubs in BR Exhibit 37 anew and has done his own creative math for which he provides no explanation. Mest. Op. Br. at 43 n.39. This does not help his case under the substantial evidence review standard. Moreover, it appears Mestrovac simply has overlooked the fact that he was paid every two weeks, not every week, and thus in his own new figuring he has erroneously doubled the overtime hours that he worked per month.

themselves, are substantial evidence that supports the challenged finding that Mestrovac worked 10.39 overtime hours per month.

2. Mestrovac's double-counting theory improperly seeks to include both (1) leave days as days worked and (2) the value of his employer's hourly contributions to support such leave

Seeking to increase his wage computation by the value of his employer's contributions for holiday and vacation pay, Mestrovac takes out of context this Court's statement in *Fred Meyer, Inc. v. Shearer*, 102 Wn. App. 336, 340, 8 P.3d 310 (2000) that "monthly wages include paid leave." Mest. Op. Br. 44. He misreads *Shearer*. The superior court here properly rejected his attempt to include his employer's contributions for holiday and vacation leave in wage computation.

Shearer holds that *hours* of leave *taken* during any relevant time period should be counted in determining the worker's hourly wage under RCW 51.08.178(1). *Shearer*, 102 Wn. App. at 340. But, as explained by the Board in its significant decision in *Shearer* (reasoning expressly adopted by this Court in *Shearer*, 102 Wn. App. at 340), a worker may *not* (as it appears Mestrovac is trying to do) include *both* (1) the cash value of hourly employer contributions (to fund paid leave) in determining his or her hourly pay rate *and* (2) leave hours in determining the schedule "normally worked" under RCW 51.08.178(1). *In re Kay Shearer*, BIIA

Dec., 96 3384, 96 3385, 1998 WL 440532, * 6 (1998) (“*In re Shearer*”).

To include *both* would be to impermissibly double-count the leave pay.

For example, the Board in *Shearer* addressed a hypothetical worker who earns \$10 per hour for a 40-hour workweek but earns and takes 2 hours of annual leave in each work week. *In re Shearer* at *6. Under the same hypothetical, the employer contributes \$.53 per hour to pay for such annual leave. *In re Shearer*, * 6 (1998). The Board stated that, to avoid understating the worker’s true hourly wage, one must either treat the worker as employed 40 hours per week at \$10 per hour, or one must deem the worker employed at 38 hours per week at \$10.53 per hour. *In re Shearer*, * 6 (1998).

The *Shearer* Court noted that the claimant there “averaged 36.1 hours per week, including compensation for paid hours of vacation, funeral, and holiday leave.” *Shearer*, 102 Wn. App. at 338. The *Shearer* Court then agreed with the Board in that case that the paid-leave hours must be included under the *hours-worked* element of RCW 51.08.178(1):

The Board concluded that Shearer’s monthly wages should include hours for which she was paid holiday, sick, vacation, and funeral leave *because these payments represented benefits paid in lieu of work under her employment contract. To exclude these hours would understate the hours she was normally employed.* Again, we adopt the Board’s reasoning that monthly wages include paid leave.

Shearer, 102 Wn. App. at 340 (emphasis added). This Court's *Shearer* decision neither states nor in any way supports the absurd proposition that the hypothetical worker may qualify for a wage computation at 40 hours per week at \$10.53 per hour. Such a computation would *overstate* the worker's true "monthly wage" for purposes of RCW 51.08.178.

Here, the Superior Court adopted the Board's finding 4 (BR 7-8) that there is no evidence that Mestrovac worked any holidays for his employer of injury.¹⁵ CP 528. This finding is a verity. RAP 10.3(a)(3); *Rodgers*, 146 Wn.2d at 61. In fact, Board Exhibit 37 does not show he worked any holidays. Mestrovac was restricted under the Employee Handbook (BR Ex. 9) to either using his annual leave (which he did regularly - - see BR Ex. 37) or cashing in a capped amount of hours on employment termination (he did cash in upon termination but, as the Board decision points out, he had regularly used his vacation leave and hence the cash-out amount was minimal - - BR 5-6). Thus, in his wage computation under RCW 51.08.178(1), he may include as hours worked

¹⁵ Mestrovac suggests that this Court can speculate that he might have had a pattern of regularly working for other employers on his holidays and paid vacation days. Mest. Op. Br. at 45. Such speculation would be inappropriate in light of his burden of proof under RCW 51.52.050. If he in fact did regularly work for other employers on his holidays and vacation days, the pay for that work would have been part of his wages, and it was his burden in the Board hearing to prove the amount of "wages [he] was receiving from all employment at the time of injury." See subsection 1 of RCW 51.08.178

all of the hours that he took as paid leave, but he may *not* include his employer's hourly contributions to fund the leave.

In sum, *Shearer* does not provide any support for Mestrovac's claim that he is entitled to double-counting of his paid leave in his monthly wage computation under RCW 51.08.178.

3. Mestrovac fails to provide any persuasive argument in his request to overturn *Erakovic* or in his attempt to distinguish unemployment taxes from the employer taxes held not to be "wages" in *Erakovic*

Mestrovac argues that the employer's taxes for unemployment benefits should be included in his wage computation. Mest. Op. Br. at 45. He also asks this Court to "reverse" its decision, *Erakovic v. Department of Labor & Industries*, 132 Wn. App. 762, 134 P.3d 234 (2006), in which this Court held that employer taxes for Social Security, Medicare, and industrial insurance do not constitute "wages." Mest. Op. Br. at 45-46.

Other than misstating this Court's rationale in *Erakovic* and that of the Supreme Court in *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 821-23, 16 P.3d 583 (2001), Mestrovac offers no new argument not raised in *Erakovic*, nor does he offer any persuasive authority or logic suggesting that *Erakovic* was wrongly decided. No petition for review was filed in *Erakovic*, and the decision must thus be given stare decisis

effect. This Court should reject his attempt to re-argue the same points this Court rejected in *Erakovic*.

Further, Mestrovac fails to provide any persuasive analysis to demonstrate why his employer's taxes for unemployment benefits should be treated differently (for wage computation) from his employer's taxes for Social Security, Medicare, and industrial insurance. The only reason that this Court in *Erakovic* did not address unemployment taxes was that the claimant there had lost on that issue at superior court and had failed to appeal. *Erakovic*, 132 Wn. App. at 775.

In *Erakovic*, this Court stated two *independent* rationales for excluding employer taxes for the various government programs from wages. Both of the rationales apply with equal force to exclude employer unemployment taxes. First, taxes an employer pays to the government-run benefits programs such as Social Security, Medicare, and Industrial Insurance are *not employer consideration to the worker for services* under the contract of hire. *Erakovic*, 132 Wn. App. at 770. Under this rationale, there is no difference between the employer taxes excluded under *Erakovic* and employer taxes for unemployment benefits.

Second, taxes for Social Security, Medicare, and Industrial Insurance do not meet the test for "other consideration of a like nature" under RCW 51.08.178(1) as construed by the Supreme Court in *Cockle*

and *Gallo*. As this Court recognized in *Erakovic*, 132 Wn. App. at 770-75, the *Cockle* test requires that, at the time of injury, the benefits at issue: (1) be objectively critical to the worker's basic health and survival, and (2) be providing a core necessity without which the worker could not survive even a temporary disability period. See *Cockle*, 142 Wn.2d at 821-23 (health benefits meet test); see also *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 491-94, 120 P.3d 564 (2005) (retirement, life insurance, and certain other fringe benefits do not meet test); WAC 296-14-524(1).

Under this alternative rationale of *Erakovic's* rejection of the worker's taxes-are-wages theory, there is no difference between the taxes for Social Security, Medicare, and Industrial Insurance, and those for unemployment benefits. Just like the taxes for Social Security, Medicare, and Industrial Insurance addressed in *Erakovic*, the taxes for unemployment benefits were not critical to protecting the basic health and survival of Mestrovac at the time of his injury. Nothing in the record or subject to judicial notice shows otherwise – indeed, under RCW 50.20.085, a worker drawing industrial insurance time-loss benefits may not draw unemployment benefits.

In sum, Mestrovac cites no authority and makes no argument beyond those advanced in *Erakovic* to support the inclusion of the value of

employer taxes under RCW 51.08.178. And, as explained above, this Court should thus reject his invitation to revisit *Erakovic*.

III. ATTORNEY FEES AND COSTS

Mestrovac cannot dispute that, if this Court, as the Department requests, reverses the Superior Court on interpreter services and affirms on wage calculation, the award below of attorney fees and costs against the Department must be reversed, and fees and costs at this level must be denied. But even if this Court affirms on interpreter services and on wage calculation, the award below of attorney fees and costs against the Department still must be reversed (*see* DLI Op. Br. at 2-3, 49), and no attorney fees or costs should be awarded against the Department at this level either. That is because (1) Mestrovac will not have prevailed on the merits of compensation issues against the Department and (2) the award below for Department-level interpreter expenses was based on Mestrovac's self-help, unbilled incurring of interpreter expenses, and such costs are not recoverable at law. *See* DLI Op. Br. at 49.

Mestrovac conclusorily asserts without citation to any authority (except RCW 2.43.040 - - *but see* discussion *supra* Part I.H) that costs incurred at the Department level of claim administration can be awarded by a superior court. Mest. Op. Br. at 28-30. It is true that certain Board-level costs *are* part of the "costs" that can be awarded to a prevailing party

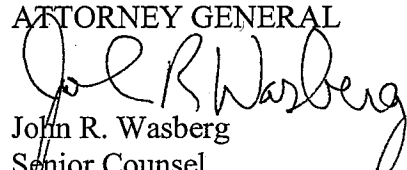
under RCW 51.52.130. *See, e.g., Ellis v. Dep't of Labor & Indus.*, 88 Wn.2d 844, 846-49, 567 P.2d 224 (1977) (charges recoverable as to expert witnesses at Board whose testimony is presented at court). There is, however, no basis in any statute, court rule or case law for awarding costs for expenses a party incurred before a case reached the Board.

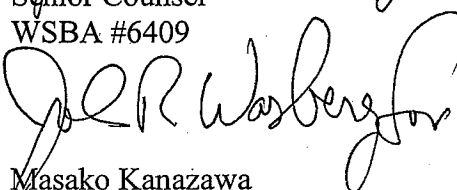
IV. CONCLUSION

For the above reasons and the reasons set forth in the Department's opening brief, this Court (1) should reverse the Superior Court ruling on interpreter services, attorney fees and costs and (2) should affirm the Superior Court ruling on the wage computation issues.

RESPECTFULLY SUBMITTED this 30th day of March, 2007.

ROBERT M. MCKENNA
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Senior Counsel
WSBA #6409


Masako Kanazawa
Assistant Attorney General
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APPENDIX A

Superior Court Order on Reconsideration

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KING COUNTY WASHINT

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SUPERIOR COURT CLERK
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DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

ENVER MEŠTROVAC,

Petitioner,

vs.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

NO. 05-2-22775-3 KNT

ORDER ON RECONSIDERATION

This matter came on before the undersigned for reconsideration of the court's decision dated March 20, 2006. The court has reviewed the respondent's motion for reconsideration, the petitioner's response and the documents in support, and is fully advised in the premises, now therefore,

ORDERED that Conclusion's No. 2.2, 2.5 and 2.6 are amended as follows:

Conclusion No. 2.2: This Court has jurisdiction over the issue of the Department's use of English to communicate with Mr. Meštrovac regarding his claim and specifically in the orders issued in English and actions which Mr. Meštrovac

ORDER ON RECONSIDERATION - 1

A-1

1 appealed to the Board and what relief Mr. Meštrovac is entitled to for interpreter
2 services regarding his industrial insurance claim.

3 Conclusion No. 2.5: The Board's June 9, 2005 Decision and Order was
4 correct as to the wage conclusion but was incorrect in failure to include findings of
5 fact and conclusions of law regarding issues raised by Mr. Meštrovac regarding
6 communications with him in English, his right to communications with his employer,
7 the Department, and counsel of his choice regarding his industrial injury in his
8 primary language or through interpreter services paid for by the Department.
9

10 Conclusion No. 2.6: The Board is directed to hold a hearing to determine the
11 amount of all interpreter expenses Mr. Meštrovac incurred because of the
12 Department's and the Board's failure to provide interpreter services for Mr.
13 Meštrovac to communicate with the Department, his employer, his health care
14 providers, and his lawyer regarding and about his claim and to award him those
15 expenses plus interest at 1% per month from the date they were incurred under
16 RCW 51.36.080. The Department shall pay those interpreter expenses incurred
17 and interest thereon until the Board assumed jurisdiction. The Board shall pay
18 those interpreter expenses incurred and interest thereon after Mr. Meštrovac filed
19 his first notice of appeal to the Board.
20

21
22 DATED: April 17, 2006
23

24 
25 JUDGE DEBORAH D. FLECK

26 ORDER ON RECONSIDERATION - 2

NO. 58200-3-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

ENVER MESTROVAC,

Respondent/Cross Appellant,
v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Appellant/Cross Respondent.

CERTIFICATE OF
SERVICE BY MAIL

I, John R. Wasberg, certify that I served a copy of **Brief in Reply and in Response by Appellant/Cross Respondent Department of Labor and Industries** on all the parties or their counsel of record on the date below by placing said documents in the United States Mail Postage Prepaid addressed as follows:

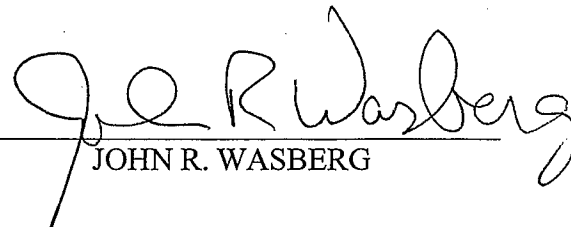
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STATE OF WASHINGTON
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of March, 2007, at Seattle, WA


JOHN R. WASBERG